RECENT CASE NOTES

ADMIRALTY—SALVAGE—RESCUE OF VESSEL FROM BOLSHEVIKI.—The plaintiffs, officers, and enlisted men of the British and Belgian forces, rescued a ship from falling into the hands of the Bolsheviki. The vessel was lying at Murmansk when that place was taken over by the Reds. The plaintiffs succeeded, with very little assistance from the crew, who were inclined to surrender the vessel, in getting up sufficient steam to get out of the harbour, after a running fight in which several were wounded. *Held*, that this was a sufficient salvage service to entitle the plaintiffs to compensation from the owners. *The Lomonosoff* (1920, Adm.) 37 T. L. R. 151.

The much lamented change from the glorious days of "wooden ships and iron men" to the days of "iron ships and wooden men" has not yet taken all the romance from the sea. There seems to be no authority directly in point, though there are analogous cases that make as interesting reading as one of Stevenson's novels. To constitute a salvage service there must be the elements of peril to the subject-matter of the service and voluntariness on the part of the salvor. Kennedy, *The Law of Civil Salvage* (1891) 18. The rescue of vessels from pirates and plunderers has been held to be a salvage service. *The Calypso* (1828, Adm.) 2 Hagg. 209; *The Lady Worsley* (1855, Adm.) 2 Spink, 253; cf. 13 & 14 Vict. c. 26, sec. 5 (1850); *Parter v. The Friendship* (1831, D. Mass.) Fed. Case No. 10,783. Salvage has been allowed to the crew of a vessel that rescued another vessel from slaves who had overpowered the crew. *The Trelawney* (1802, Adm.) 4 C. Rob. 223; see *The Armistad* (1841, U. S.) 15 Pet. 518. But the service must be rendered during the actual insurrection of the slaves. *The Anne* (1804, Adm.) 5 C. Rob. 100. It was held to be a salvage service in an interesting case of a master and boy who recovered a vessel from a prize crew which had been placed in charge of her, and in another case in which a vessel recaptured a prize from an enemy. *The Beaver* (1801, Adm.) 3 C. Rob. 293; *Bas v. Tingey* (1800, U. S.) 4 Dall. 37. Salvage has not been allowed in those cases where the loyal members of the crew recovered the vessel from their mutinous shipmates. *The Governor Raffles* (1815, Adm.) 2 Dod. 14; *The Francis and Eliza* (1816, Adm.) 2 Dod. 115, 118. The court decided the instant case upon the analogy of a vessel recovered from pirates or mutineers, inasmuch as there was at Murmansk no government recognized by England and no established government at all, and granted the plaintiffs an award for their meritorious service.

AGENCY—MASTER AND SERVANT—GROUNDS FOR DISCHARGE—SINGLE INSTANCE OF INTOXICATION.—The plaintiff was an agent in the employ of the defendant real estate company under the usual contract requiring him to give his entire time and energy to the work of his employment. One afternoon he came into the defendant's office in a state of intoxication, incoherent, but not boisterous or offensive. He was sent home and subsequently was discharged. This action was brought to recover damages for wrongful discharge. *Held*, that the question of justification was one of fact for the jury. *Herbert v. Wood, Dolson Co.* (1920, Sup. Ct.) 113 Misc. 671, 185 N. Y. 325.

To justify a servant's discharge there must have been a breach of an express or implied condition of the contract of service. That he will abstain from *habitual* drunkenness is always implied. *Bass Furnace Co. v. Glasscock* (1887) 82 Ala. 452, 2 So. 315. An occasional, or even a single, instance of intoxication may be a sufficient breach of the implied condition; for, if his conduct is likely

to be prejudicial to the interests or reputation of his master, or if it is incompatible with the due and faithful performance of his duty, his discharge is justifiable. *McEdwards v. Ogilvie* (1886) 4 Manitoba, 1. Since there clearly can be no fixed rule of law which, in every case, would determine this question, it seems properly one for the jury, with explicit instructions from the court as to what constitutes a sufficient ground for discharge. *Clouston v. Corry* [1906, H. L.] A. C. 122. But, when the servant's acts are flagrant, the court may hold as a matter of law that the discharge was justified. See *Dorrance v. Hoopes* (1914) 122 Md. 344, 352, 90 Atl. 92, 95. A choir master may be discharged for being once intoxicated, because of the effect that condonation of his offense would have upon his pupils. *Martin v. Lane* (1885) 3 Manitoba 314. The owner of a plantation may refuse to turn it over to an overseer who is drunk at the time. *Johnson v. Gorman* (1860) 30 Ga. 612. And a railroad engineer who was occasionally noticeably affected by liquor while on duty may be discharged, since it would clearly have been negligence on the part of the company towards its passengers to have retained him. *Smith v. Ry.* (1895) 60 Minn. 330, 62 N. W. 392. Moreover, it is unnecessary that the drunkenness occur while the servant is on duty, if he is by it rendered incapable of faithful and efficient performance. *Ulrich v. Hower* (1893) 156 Pa. 414, 27 Atl. 243. On the other hand, occasional intoxication may not be of much importance, as in the case of an apprentice. *Wise v. Wilson* (1845, N. P.) 1 Car. & Kir. 662. Or in the case of seamen, with whom courts of admiralty are inclined to be rather lenient. *The Atlantic* (1862, Adm.) Lush. 566; *The El Dorado* (1868, D. Mass.) Lowell 289. Under the circumstances of the principal case, where there is a reasonable doubt as to the severity of the plaintiff's offense, it seems that the court's view that the case should have been submitted to the jury is correct. Regarding grounds of dismissal generally, see (1918) 27 YALE LAW JOURNAL, 954. And as to the damages recoverable, see (1912) 21 *id.* 691.

AGENCY—MASTER AND SERVANT—LIABILITY OF MASTER FOR INJURY TO VOLUNTEER.—The defendant's servant, who was operating a motor truck, invited the plaintiff, a minor, without authority, to assist him in unloading the truck. While driving back to the defendant's shop, the plaintiff was asked to ride on the running board to facilitate the driving, and while they were rounding a curve at considerable speed, he was thrown from the truck and sustained the alleged injuries. The plaintiff was non-suited. *Held,* that there should be a new trial. *Kalmich v. White* (1920, Conn.) 111 Atl. 845.

The English rule absolves the master on the fellow-servant doctrine; while the majority of the American courts reach the same conclusion on the theory that, the relation of master and servant not existing, the volunteer assumes all risks and has a cause of action for wilful or wanton injury only. For a discussion of the English and American cases, see (1920) 30 YALE LAW JOURNAL, 85, commenting on *Heasmer v. Pickfords, Ltd.* (1920, K. B.) 36 T. L. R. 818; *Grissom v. Atlanta Ry.* (1907) 152 Ala. 110, 44 So. 661; see *Geer v. Sound Transfer Co.* (1915) 88 Wash. 1, 4, 152 Pac. 691, 693. The instant case, however, places the volunteer on the same footing as a trespasser. It is generally recognized that one owes a trespasser the duty of using ordinary care to avoid injuring him after discovering him in a perilous position. *Webb v. Kansas City So. Ry.* (1919) 137 Ark. 107, 208 S. W. 301; 29 Cyc. 443. See also (1921) 30 YALE LAW JOURNAL, 201. It is submitted that this step is justifiable in view of the fact that a volunteer is present to promote the interests of the master, while a trespasser is a tortfeasor. Hence it seems not extreme but a logical development to hold that a volunteer should enjoy at least as advantageous a position as a trespasser. See *Evarts v. St. Paul Ry.* (1894) 56 Minn. 146, 57 N. W. 459, 460.

BILLS AND NOTES—CHECKS—CERTIFICATION CONDITIONAL UPON PROCUREMENT OF INDORSEMENT.—The plaintiff as transferee brought action on a check against the drawee bank, which had returned it for indorsement by the payee, having certified it in conformity with clearing house rules. *Held,* that the certification was here conditioned on the procuring of proper indorsement, without which the defendant was under no duty. *Lipten v. Columbia Trust Co.* (1920) 194 App. Div. 384, 185 N. Y. Supp. 198.

It is generally stated that certification is equivalent to an acceptance. N. I. L. sec. 187; *First Nat'l Bank v. Currie* (1907) 147 Mich. 72, 110 N. W. 499. However, some distinctions exist. Certification is different from an acceptance in that it is not an added, but a substituted, obligation. Tiffany, *Banks and Banking* (1912) 131. A check, being payable on demand, calls for payment and not for acceptance, and, if the holder takes the obligation of the bank for payment, he thereby discharges the drawer and takes the obligation of the drawee. *Times Square Automobile Co. v. Rutherford Nat'l Bank* (1909) 77 N. J. L. 649, 73 Atl. 479; N. I. L. sec. 188; Tiffany, *op. cit.,* 132. In other respects, no distinction is made between certification and acceptance. An acceptance not to become operative until the happening of an event is conditional. *Burns & Smith Lumber Co. v. Doyle* (1899) 71 Conn. 742, 43 Atl. 483. There seems to be no reason why a certification may not likewise be conditional. In the case of *Meuer v. Phenix Nat'l Bank* (1904) 94 App. Div. 331, 88 N. Y. Supp. 83, a payee's transferee for value, without indorsement, was allowed to recover against a bank which had certified a check without any expressed condition. Since the bank is under no duty to certify a check, it ought to be able, so far as the person for whom it certifies the check is concerned, to make its certification on such terms and conditions as it sees fit to impose. In the instant case the intention to make the certification conditional was plain.

CONSTITUTIONAL LAW—VESTED RIGHTS—POWER TO REPURCHASE SCHOOL PROPERTY UPON NON-USER.—A school district in the city of Des Moines acquired land for a school site by purchase and warranty deed. A subsequently enacted statute provided that in case of two years continuous non-user for school purposes all land acquired by school districts should revert to the owner of the tract from which it was taken upon repayment of the purchase price. The statute was subsequently amended to apply only to school districts wholly outside any city or incorporated town. The school district brought this suit to quiet title, preparatory to a sale of the property for business purposes. *Held,* that the statute had created no vested right in the beneficiary which could not be divested by repeal or modification of the statute. *Independent School Dist. v. Smith* (1921, Iowa) 181 N. W. 1.

The constitutional protection of vested rights from legislative interference does not extend to expectant and contingent interests. See Cooley, *Constitutional Limitations* (7th ed. 1903) 511. Thus the owner of tide lands has no vested right in possible future accretion. *Western Pac. Ry. v. Southern Pac. Co.* (1907, C. C. A. 9th) 151 Fed. 376, 398. A retroactive statute changing estates in fee tail to estates in fee simple is valid, since the heir presumptive has no vested right. *Lane v. Davis* (1796) 2 N. C. 277; *Van Rensselaer v. Poucher* (1847, N. Y. Sup. Ct.) 5 Den. 35; see 23 Ann. Cas. 62, note. A retroactive statute changing joint tenancies to tenancies in common is valid, since the right of survivorship is a mere expectancy. *Holbrook v. Finney* (1808) 4 Mass. 565; *Miller v. Dennett* (1833) 6 N. H. 109; *contra, Greer v. Blanchar* (1870) 40 Calif. 194. Assuming the existence of a grantor's possibility of reverter upon the dissolution of a quasi-public corporation, it is not a vested right. *Bass v. Roanoke Navigation and Water Power Co.* (1892) 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247, note. As to the existence of this possibility of reverter, see (1911) 10 MICH. L. REV. 121.

The term "vested right" often appears to be used in a broader sense than the terms "property" and "estate." For example an inchoate right of dower is said to be neither property nor a vested right. *Lucas v. Sawyer* (1864) 17 Iowa, 517; see 19 L. R. A. 256, note. But, immediately upon the husband's death the widow has a vested right (power) protected under the federal Constitution from legislative control. *Bunker v. Barron* (1859) 8 Iowa, 132. Before assignment, however, it is still inalienable at law as property though assignable in equity. *Huston v. Seeley* (1869) 27 Iowa, 183, 198. Her interest is a mere power to demand assignment, and, until she exercises this power, she has no "property" right at law. *Rausch v. Moore* (1878) 48 Iowa, 611; 1 Washburn, *Real Property* (6th ed. 1902) 257. A power of re-entry, reserved by the grantor of a fee on condition, though inalienable at common law, has been called a vested right, protecting the grantor's heir-at-law from the retroactive effect of a statute making it devisable and alienable, but no distinction was made as to whether the alleged breach of condition occurred before or after the death of the grantor. See *Southard v. Central Ry.* (1856, Sup. Ct.) 26 N. J. L. 13. The interest of a contingent remainderman, though not at common law an alienable property interest, has been called a vested right. See *Aetna Life Ins. Co. v. Hoppin* (1914, C. C. A. 7th) 214 Fed. 928. But in Oregon it is held that contingent remainders are mere expectancies and until they actually vest are subject to legislative control. *Lee v. Albro* (1919) 91 Ore. 211, 178 Pac. 784. In the instant case the fee simple acquired by the school district through purchase was made defeasible by the statute upon the concurrence of two contingencies: two years' non-user for school purposes, and the exercise of the power of repurchase by the beneficiary. The beneficiary, not being the grantor but the owner of the tract from which the school site was taken, did not have a power of re-entry nor a possibility of reverter but merely a statutory option to purchase certain land on certain conditions. *Waddell v. Board of Directors* (1919, Iowa) 175 N. W. 65. The condition upon which it might be exercised not having occurred, it is submitted that he was deprived of no vested right by the amendment. This conclusion seems unimpeachable in view of the fact that the statute did not exist at the time the conveyance was made, and so did not enter into the original contract. As to the extent to which existing statutes and decisions enter into contracts and become subject to the constitutional provision against impairment of contract obligations, see Willoughby, *Constitutional Law* (1910) secs. 518-19; Dodd, *Impairment of the Obligation of Contract by State Judicial Decisions* (1909) 4 ILL. L. REV. 155, 327.

CONTRACTS—DURESS—THREATS TO INJURE THIRD PARTIES.—In an action to recover the balance due upon certain promissory notes, the defendant set up the defence of duress and entered a counterclaim for the money already paid, based on the fact that the notes were obtained from him by threatening to arrest his brother-in-law for criminally appropriating funds of the plaintiff bank. The plaintiff demurred to the counterclaim. *Held*, that money paid to compound a felony could not be recovered, Greenbaum, J., basing his decision on the fact that threats to prosecute a brother-in-law did not constitute duress. *Union Exchange National Bank v. Joseph* (1920) 194 App. Div. 295, 185 N. Y. Supp. 403.

Duress is a good defence to an action upon a contract because a party is privileged not to perform an agreement which he did not enter into voluntarily; i. e., he is under no duty, but has a power to create one by ratification. See Joyce, *Defenses to Commercial Paper* (1907) sec. 105; see NOTES (1913) 26 HARV. L. REV. 255. In early times the legal standard applicable to ascertain the fact of duress was the resisting power of a man of courage. See 1 Blackstone, *Commentaries*, 130; 1 Chitty, *Bills of Exchange* (11th ed. 1878) 61; 3 Williston, *Contracts* (1920) sec. 1601. Later the standard was changed to that of a person

of ordinary firmness. Chitty, *Contracts* (11th ed. 1874) 272 (where the text recognizes the possibility that a battery may constitute duress); *United States v. Huckabee* (1872, U. S.) 16 Wall. 414, 432; *Ortt v. Schwartz* (1916) 62 Pa. Super. Ct. 70. This, in turn, in some jurisdictions has been extended from an extrinsic standard to an individual one, depending on the character and power of resistance of the person seeking relief. See Joyce, *loc. cit.*; 3 Williston, *op. cit.*, sec. 1603; see NOTES (1913) 1 VA. L. REV. 481, 483; *Galusha v. Sherman* (1900) 105 Wis. 263, 81 N. W. 495. In general, threats against a wife, husband, parent, or child have been held to constitute duress. *Rostad v. Thorsen* (1917) 83 Ore. 489, 163 Pac. 423; *Spoerer v. Wehland* (1917) 130 Md. 226, 100 Atl. 287; see L. R. A. 1915D, 1120, note. In the more liberal jurisdiction threats against other relatives have been held sufficient. *Fountain v. Bigham* (1912) 235 Pa. 35, 84 Atl. 131 (son-in-law); *Sharon v. Gager* (1878) 46 Conn. 189 (nephew); *Davies v. London & P. Marine Ins. Co.* (1878) L. R. 8 Ch. Div. 469 (friend); 26 L. R. A. 64, note. The modern tendency seems to be toward the individual standard. See NOTES (1920) 20 COL. L. REV. 80. Statutes govern duress in some states now. *Pendleton v. Greever* (1920, Okla.) 193 Pac. 885; *Merchant's Collection Agency v. Roantree* (1918) 37 Calif. App. 88, 173 Pac. 600. Applying the individual standard, blood ties and relationship should have no operative effect of themselves. See 3 Williston, *op. cit.*, sec. 1621. Wherever duress has actually been found to exist, the courts appear to have granted relief irrespective of any relationship of the parties. Therefore, it would seem that the dissenting opinion in the principal case is in accord with the better and more liberal rule.

CONTRACTS—USAGE AND CUSTOM—WHEN ADMISSIBLE AS PART OF CONTRACT.—The plaintiff contracted to sell to the defendant, a wholesale dealer, 50,000 tons of coal to be shipped in equal monthly instalments, for twelve months beginning December 30, 1915. The amount of coal called for per month was never actually delivered, but the defendant paid for what he got. During the period September-November the plaintiff delivered 8,400 tons, but the defendant refused to pay for a substantial part of it. In an action for goods sold and delivered the defendant set up a counterclaim for damages for breach of contract during September-November, whereupon the plaintiff pleaded a usage, that where cars were not available for the full amount of coal contracted for, the coal would be apportioned pro rata among the vendees. Evidence was admitted to prove the usage, to which the defendant excepted. *Held*, that evidence of the usage as part of the contract was admissible. *Nicoll v. Pittsvein Coal Co.* (1920, C. C. A. 2d) 269 Fed. 968.

In the instant case no question as to the existence, reasonableness, legality, or other necessary elements of the usage is involved. See 2 Williston, *Contracts*, (1920) secs. 657-661; 27 R. C. L. 154-168. Nor is the usage offered to interpret the language of the agreement. See 2 Williston, *op. cit.*, sec. 650; 4 Wigmore, *Evidence* (1905) sec. 2464. But if admissible, the facts of the usage are added to and become part of the agreement itself. The general way of expressing the rule is that where the usage varies or contradicts the written terms of the instrument, it is not admissible. *United Steel & Metal Corp. v. Catevenis* (1920, App. Div.) 182 N. Y. Supp. 879; *Guild v. Sampson* (1919) 232 Mass. 509, 122 N. E. 712. This is fallacious, because any usage if admitted is bound to vary the writing. The principal case applies what seems to be the better test, namely, whether or not the parties intended to include the usage. *Humfrey v. Dale* (1857, Q. B.) 7 El. & Bl. 266, 274; see 4 Wigmore, *op. cit.*, secs. 2430, 2440; 2 Williston, *op. cit.* secs. 651-652. The presumption is that unless it is specifically excepted, both parties contracted with reference to it. *Lillard v. Ky. Distilleries & Warehouses* (1904, C. C. A. 6th) 134 Fed. 168; see 2 Williston, *op. cit.*, sec. 656. But the usage is not admissible if, when it is included in the agreement, it would be

clearly repugnant to the other terms. See *Humfrey v. Dale, supra,* per Lord Campbell. The cases are in confusion and the courts appear to decide each case according to its own peculiar circumstances. *Sutro v. Heilbut* [1917, C. A.] 2 K. B. 348 (transportation by land substituted in term of contract specifying transportation by water, when necessary); *McDonald v. Union Hay Co.* (1919) 143 Minn. 40, 172 N. W. 891 (usage admitted to show requirement of 24 hour ultimatum before breach could be operative); but see *contra, Hart v. Cort* (1914) 165 App. Div. 583, 151 N. Y. Supp. 4 (usage not admissible to show that license to produce play meant an exclusive license). If in the instant case the contract had called for delivery *unconditionally,* the usage would be clearly repugnant. But the words of the contract are not such as specifically to exclude the usage. Thus it seems that in admitting the usage, the principal case is in accord with the better view.

CRIMINAL LAW—SCIENTER AND INTENT UNNECESSARY IN STATUTORY CRIMES.—The plaintiff junk dealer was indicted and pleaded guilty under section 169 of the federal Criminal Code, which declares that "whoever, without lawful authority, shall have in his possession" any die which could be used in counterfeiting United States coin, shall be punished. He made an explanatory statement to the court outside his pleadings that the dies came into his possession without his knowledge in a purchase of junk. He then sued out a writ of habeas corpus, and contended that the law was contrary to the Fifth Amendment in that it made criminal a possession which was neither willing nor conscious. *Held,* that the law was constitutional. *Baender v. Barnett* (1921) 41 Sup. Ct. 271.

In deciding the case the court states that the statute must be construed as intending to make criminal only a willing and conscious possession of such dies, and that by pleading not guilty and showing his ignorance of the presence of them he would not have been convicted. The rule at common law is that a mere intention to commit a crime without any overt act accompanying it, or a mere overt act with no intention to commit a crime is not punishable. 1 Bishop, *New Criminal Law* (8th ed. 1892) secs. 204-208. In statutory crimes, a criminal intent not connected with any overt act may not be punished as a crime, and any statute purporting to do so is unconstitutional. *Ex parte Smith* (1896) 135 Mo. 223, 36 S. W. 628; *Proctor v. State* (1918, Okla. Cr. App.) 176 Pac. 771. It is held that an overt act done contrary to the letter of the statute, but with no criminal intent to violate it, is punishable as a crime. *People v. Emmons* (1913) 178 Mich. 126, 144 N. W. 479; *State v. Smith* (1920, Mont.) 190 Pac. 107. However, it has been stated that even an unconscious possession of a prohibited article would be sufficient ground for a valid conviction, though "a conviction would be unlikely." See *People v. Johnson* (1919) 288 Ill. 442, 445, 123 N. E. 543, 545. Where a storekeeper sold naphtha under a trade name of "Lustro," not knowing it was naphtha, he was found guilty under a statute forbidding its sale. *Gately v. Taylor* (1912) 211 Mass. 60, 97 N. E. 619. The same result was reached in a sale of oleomargarine. *State v. Newton* (1885, Sup. Ct.) 50 N. J. L. 534. It is submitted that under sufficient necessity the legislatures might declare even a totally unconscious possession of an article sufficient ground for a valid conviction.

INSURANCE—STANDARD FIRE POLICY—VALIDITY OF THE CO-INSURANCE CLAUSE.—The plaintiff was insured with the defendant company under a fire policy in the standard form. The defendant inserted in this policy a co-insurance clause by which, if the plaintiff failed to carry insurance up to 80 per cent of the value of the property, the defendant would not be liable for a greater proportion of any loss than the sum insured bears to 80 per cent of the value of the property at the time of loss. The standard policy laws permit the addition of clauses,

provided that no such clause is "inconsistent with or a waiver of any of the conditions of the standard fire insurance policy." In the absence of such a co-insurance clause the terms of the standard policy secure to the insured payment of his entire loss up to the amount of the insurance. The pro rata clause of the standard fire policy provides that "This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, *whether valid or not and whether collectible or not.*" The plaintiff failed to carry insurance up to 80 per cent of the value of his property, and, in an action to recover for a loss, the defendant set up the co-insurance clause as a bar to full recovery. The plaintiff contended that this clause was inconsistent with the standard fire policy and void. *Held,* that the co-insurance clause was valid, since the pro rata clause was meant to include co-insurance, and since the legislature must be deemed to have considered this clause valid from its long continued use with the legislature's knowledge. Page, J., *dissenting. Aldrich v. Great Amer. Ins. Co.* (1921, App. Div.) 186 N. Y. Supp. 569.

The purpose of the standard fire policy laws was primarily to protect the insured against unusual and unnoticed conditions which would serve to defeat his well grounded expectations. *Quinlan v. Insurance Co.* (1892) 133 N. Y. 356, 31 N. E. 31; *Gazzam v. Insurance Co.* (1911) 155 N. C. 330, 71 S. E. 434; Vance, *Insurance* (1904) 432. Contracts of insurance made in any other form are wholly unenforceable as against the insured, but are enforceable as against the insurer. *Armstrong v. Insurance Co.* (1893) 95 Mich. 137, 54 N. W. 637; *Hicks v. Ass. Co.* (1900) 162 N. Y. 284, 56 N. E. 743. The rule of construction in favor of the insured applies to the standard policy as strictly as it formerly applied to the old forms. *Matthews v. Insurance Co.* (1897) 154 N. Y. 449, 456, 48 N. E. 751, 752; *Davis & Co. v. Insurance Co.* (1897) 115 Mich. 382, 73 N. W. 393. The co-insurance clause has been held inconsistent with the Kentucky valued policy laws and thus void. *Sachs v. Insurance Co.* (1902) 113 Ky. 88, 67 S. W. 23; *Hartford Ins. Co. v. Henderson Brewing Co.* (1916) 168 Ky. 715, 182 S. W. 852. In several states the co-insurance clause is expressly forbidden by statute. See Mo. Rev. St. 1909, sec. 7023; Wis. St. 1911, sec. 1943a; *Alsop Process Co. v. Insurance Co.* (1914) 175 Mo. App. 317, 162 S. W. 313. Some of these states forbid it except upon the express written request of the insured upon a form prescribed by statute. See Supp. Code Iowa 1913, sec. 1746; Mich. Comp. Laws 1915, secs. 9484-9489; *Att'y General v. Commissioner of Ins.* (1907) 148 Mich. 566, 112 N. W. 132. The court in the instant case concedes that "The co-insurance clause is a dangerous thing for a person who does not understand it . . . in the sense that he will not get what he thinks he is going to get." An examination of the clause and the labored explanation of the pro rata clause given in the opinion suggests that the average insured—if perchance he should read his policy—would not understand it. And the very purpose of the standard fire policy was to prevent such clauses from depriving the insured of "what he thinks he is going to get." The plain meaning of the pro rata clause would seem to forbid the interpretation placed upon it by the court. Nor is there any adequate reason why silence on the part of the legislature should be construed as giving consent to it. It is submitted, therefore, that the co-insurance clause should have been held invalid, a result reached in a recent case in the New York Supreme Court, which the instant case overrules. *Durham v. Insurance Co.* (1920, Sup. Ct.) 112 Misc. 440, 182 N. Y. Supp. 887.

INSURANCE—WARRANTY OF SEAWORTHINESS—WAIVER AND ESTOPPEL.—The insurance company's inspector reported to it that the ship in question was an undesirable risk. Later, the company issued a policy at a higher rate than usual, containing a warranty of seaworthiness. There was some evidence that at that

time a different report as to the ship's condition had been returned. *Held*, that a charge to the jury that the insurance company would be liable despite the warranty, if it knew the ship was unseaworthy and took the risk at a higher premium, should be upheld. *American Marine Ins. Co. v. Ford Corp.* (1920, C. C. A. 2d) 269 Fed. 768.

Warranties in insurance are in the nature of conditions precedent, in that upon strict compliance with them in every particular depend all rights of the insured in the policy. *Metropolitan Life Ins. Co. v. Rutherford* (1900) 98 Va. 195, 35 S. E. 361; *Ala. Gold Life Ins. Co. v. Johnston* (1887) 80 Ala. 467, 2 So. 125; but see *Chambers v. Northwestern Mutual Life Ins. Co.* (1896) 64 Minn. 495, 497, 67 N. W. 367, 368 (condition subsequent). By some courts, it has been held that if a warranty is not in fact complied with, the policy cannot be the foundation of any rights, regardless of the knowledge of the insurer of the actual condition of the risk at the time the insurance attached. *State Mutual Ins. Co. v. Arthur* (1858) 30 Pa. 315; *Franklin Fire Ins. Co. v. Martin* (1878) 40 N. J. L. 568. This result is reached through the view that as to a representation not true in fact the insurer's defense will be cut off, where by reason of his knowledge, there could be no misrepresentation; whereas with regard to a warranty, his defense is not fraud or misrepresentation, but failure to perform a condition precedent, as to which his knowledge or lack of knowledge of precedent facts is immaterial. In the final analysis, an affirmative warranty would seem to be nothing more than a representation conclusively made material by the terms of the contract. In regard to both representations and warranties relating to matters of opinion, the better view would seem to be to hold the insured merely to good faith, though few courts have been willing to apply the principle to warranties. *Supreme Lodge v. Dickson* (1899) 102 Tenn. 255, 52 S. W. 862; *Schwarzbach v. Protective Union* (1885) 25 W. Va. 622, 657. "Seaworthiness" is only a relative term depending on the particular service to be required of the ship. See 2 Arnould, *Marine Insurance* (9th ed. 1914) 873; Vance, *Insurance* (1904) 547. The term should not be construed in a way repugnant to the general purpose of the parties at the time the contract was executed. *Thebaud v. Great Western Insurance Co.* (1898) 155 N. Y. 516, 50 N. E. 284; *Farmer's Feed Co. v. Insurance Co.* (1908, C. C. A. 2d) 166 Fed. 111. By the weight of authority, if the company, through its agents, at the time the risk was to attach, knew of facts which, by reason of conditions inserted in the contract, would prevent it from ever attaching, and if the insured was misled by the acts of the company, it will be estopped to set up the breach of the condition. *Van Schoick v. Niagara Fire Ins. Co.* (1877) 68 N. Y. 434. There is undoubtedly a growing tendency to allow parol evidence to be introduced to set up a waiver or estoppel, and to admit frankly that in so doing an exception to the parol evidence rule is being established in favor of policy holders, because of the peculiar nature of such contracts. See *Welch v. Fire Ass'n of Phila.* (1904) 120 Wis. 456, 467, 98 N. W. 227, 230; *Spalding v. N. H. Ins. Co.* (1902) 71 N. H. 441, 444, 52 Atl. 858, 860; see (1920) 29 YALE LAW JOURNAL, 795. However, it is difficult to see how a true estoppel can be worked out in the instant case. A primary prerequisite for an estoppel is that the insured shall have been misled by the company. See Vance, *op. cit.*, sec. 124. There is nothing to show that the insured here did not intend to make the warranty a part of his obligation, or did not know it was written in the policy. Furthermore a warranty of seaworthiness is implied in fact in every contract of insurance on a ship. *Van Wickle v. Mechanics & Trader's Bank* (1884) 97 N. Y. 350; *Dixon v. Sadler* (1839, Exch.) 5 M. & W. 405, 414. Hence, it cannot be said he was misled by any act of the company, and the basis for an estoppel is lacking. Though the doctrine of the instant case would seem to be inconsistent with the present United States

Supreme Court rule, it may possibly be justified on the ground that the warranty was not as to a fact absolutely certain, but as to a matter of opinion, in which the insured should be held only to good faith.

PRACTICE—LAW OF THE CASE—MATTERS CONCLUDED BY A DECISION OF APPELLATE COURT.—The United States Supreme Court reversed a judgment for the plaintiff on the ground that, in rendering it, the Missouri court disregarded a judgment of a Connecticut Court which had held an insurance assessment valid. The Missouri court, upon reconsideration of the case, resolved that the Supreme Court had left untouched any consideration of the elements constituting the assessment and decided that a tax imposed by the laws of Missouri had been unlawfully included in the assessment, which was therefore void. The question was whether the state court proceeded in consonance with the decision of the Supreme Court. The defendant contended that the effect of the inclusion of the tax was presented to the Supreme Court, and that, by its decision, the state court was precluded from passing upon the validity of the inclusion of the tax in the assessment. *Held,* that the inclusion of the tax not having been discussed in the former decision, the state court was not precluded from passing on the question, as omissions do not constitute a part of a decision and become the law of the case. Holmes, Van Devanter, and McReynolds, J.J., *dissenting. Hartford Life Ins. Co. v. Blincoe* (1921) 41 Sup. Ct. 276.

When a question arising in the course of litigation has been determined by an appellate court, it cannot, after remand, be raised again and relitigated in the lower court. Black, *Law of Judicial Precedents* (1912) secs. 81, 83; 4 C. J. 1215; but see (1920) 29 YALE LAW JOURNAL, 568. The effect of a decision, as the law of the case, is restricted to propositions of law actually decided, and such points as are necessarily determined by the decision. *Parkin v. Grayson-Owen Co.* (1914) 25 Calif. App. 269, 143 Pac. 257. Where the judgment actually rendered could not have been given without deciding a particular question in a particular way, the decision of it is necessarily implied, although it was not expressly mentioned. *McKinney v. State* (1889) 117 Ind. 26, 19 N. E. 613. Some courts hold that, for a decision to be conclusive, the question involved must have been presented to the court as necessary to a decision in the case, and directly considered and decided, and that parties should not be concluded upon questions that are decided by mere implication arising from the general disposition of a case. *Gwin v. Waggoner* (1893) 116 Mo. 143, 22 S. W. 710. The principal case seems to hold that a decision is conclusive, as an adjudication, only as to those questions consciously before the court. This seems to be the better view, for it is often difficult to ascertain what is necessarily determined by a decision.

PROPERTY—FUTURE INTERESTS—RULE IN SHELLEY'S CASE—A conveyance was made to one Goode, "and after his death to the heirs of his body, their heirs and assigns forever." Goode, after birth of issue, sold to the defendants. The plaintiffs claimed as heirs of the body of Goode. *Held,* that Goode had but a life estate, the rule in Shelley's Case not applying, and that the plaintiffs should take as remaindermen. *Blythe v. Goode* (1920, C. C. A. 4th) 269 Fed. 544.

The rule in Shelley's Case applies where, after a life estate, a remainder is limited to the life-tenant's heirs, or to the heirs of his body, making such a remainder take effect by descent and giving an inheritable interest to the life tenant. But heirs or heirs of the body must be used technically to mean an indefinite succession of the life tenant's issue; and a preliminary question is always raised as to whether the words used mean such indefinite succession or designate particular persons at the death of the life tenant, who may now be the source of the line of descent. In *Archer's Case,* which started this trend of decisions, it was decided that a limitation to R. A. and after to the next heir

male, and to the heirs male of the body of such heir male, did not come within the rule. (1599 C. P.) Coke, Pt. I, 66b. In England this interpretation has been generally limited, due to the fact that at the death of the life tenant there can be but one heir, to cases where the word "heir" is used in the singular, "heirs" necessarily signifying successive generations. *Wright v. Pearson* (1758, Ch.) 1 Amb. 358. Although a slight change in wording may affect the interpretation of the intention of the grantor or testator, so that each case must be decided independently, some general conclusions can be drawn. Where the remainder is to the heirs of the life tenant, their heirs and assigns, by the weight of authority, an indefinite succession is meant and the rule applies. *Harrison v. Harris* (1914) 245 Pa. 397, 91 Atl. 617; *Ryan v. Ryan* (1919) 138 Ark. 362, 211 S. W. 183. Words of similar import have a like effect; a remainder to the heir "forever" or "in fee" gives a fee to the life tenant. *Silcocks v. Silcocks* [1916] 2 Ch. 161; *Stathers v. Renz* (1916) 251 Pa. 315, 96 Atl. 717. "In fee simple and forever" is interpreted in the same way. *Roberson v. Moore* (1915) 168 N. C. 388, 84 S. E. 351. But a remainder to the "heirs" (in the United States) or "heir" (in England) "absolutely" has been held not within Shelley's rule. *Westcott v. Meeker* (1909) 144 Iowa, 311, 122 N. W. 964; *In re Hussy and Green's Contract* (1921, Ch.) 37 T. L. R. 407. Where the course of descent is changed, as where the remainder is limited to the life tenant's bodily heirs and their heirs general, Shelley's Case is usually held not to apply. "Heirs of the body, their heirs and assigns," as in the instant case, makes "heirs of the body" words of purchase. *Aetna Life Ins. Co. v. Hoppin* (1914, C. C. A. 7th) 214 Fed. 928. A similar interpretation is given to a remainder to heirs of the body in fee simple. *Benson v. Tanner* (1917) 276 Ill. 594, 115 N. E. 191; *contra, Burton v. Carnahan* (1906) 38 Ind. App. 612, 78 N. E. 682. See 29 L. R. A. (N. S.) 963, note.

SURETYSHIP—CONTRACTOR'S BOND—PAYMENTS TO MATERIALMAN AS RELEASE OF SURETY.—The defendant surety company gave a bond to secure the faithful performance of a building contract. Although not parties to the bond, the materialmen were expressly protected by its terms. This action was brought to recover $15,790.13 for material furnished on the job by the plaintiff company, although it admitted having received more than that amount from the contractor while the building was being erected. The plaintiff knew the source of at least part of the funds from which these payments were made, and applied them to previous debts of the contractor. The plaintiff was also in a position to file a lien on a building fund of $15,000 which had been set aside by the owner, but failed to do so until after $10,000 had been withdrawn. *Held,* that the plaintiff could not recover. *Alexander Lumber Co. v. Aetna Accident & Liability Co.* (1921, Ill.) 129 N. E. 871.

According to the general rule, a debtor and creditor have the privilege and power of determining the application of a payment regardless of the interests of third parties, such as sureties. *Wyandotte Coal Co. v. Wyandotte Paving Co.* (1916) 97 Kan. 203, 154 Pac. 1012; *Irving v. Mutual Trust Co.* (1914) 82 N. J. Eq. 629, 90 Atl. 274. There are, however, several recognized exceptions. See 3 Williston, *Contracts* (1920) sec. 1804. The authorities are in conflict as to whether the facts of the instant case come within one of such exceptions. It has been held that under such circumstances, the surety is discharged. *Columbia Digger Co. v. Sparks* (1915, C. C. A. 9th) 227 Fed. 780; *Bross v. McNicholas* (1913) 66 Ore. 42, 133 Pac. 782; but see *contra, Chicago Lumber Co. v. Douglas* (1913) 89 Kan. 308, 131 Pac. 563; *People v. Powers* (1896) 108 Mich. 339, 66 N. W. 215. In analogous cases, where money has been received from a tax collector by a municipality, in ignorance of the source from which it was derived, the authorities seem to be uniform in holding that such money can be applied to previous indebtedness, due to default, though detrimental to

the sureties on the tax collector's bond for the current year. *Hudson v. Miles* (1904) 185 Mass. 582, 71 N. E. 63; *Grafton v. Reed* (1890) 34 W. Va. 172, 12 S. E. 767. The cases opposed to the holding in the principal case seem to rest on a sounder basis. There seems to be no reason in the instant case to deny to the creditor the usual power, in the absence of direction by the debtor, to apply payments as he sees fit. If the creditor does know the source of the money, it is the debtor's money and the reason for raising an equity in favor of the surety is not apparent. Moreover, there is no necessity for protecting surety companies by creating this equity in their favor, since they can protect themselves adequately by making proper express reservations in the surety bond. The fact that the security was reduced by the materialman's laches in filing a lien could not affect the liability of the surety company. Mere neglect on the part of a creditor to enforce his claim does not discharge the surety. *Lewis v. Blume* (1917) 226 Mass. 505, 116 N. E. 271; *Villars v. Palmer* (1873) 67 Ill. 204. Even if a prior lien had been relinquished it would merely discharge the surety *pro tanto*. *Sterne v. Bank of Vincennes* (1881) 79 Ind. 549; *Holmes v. Williams* (1898) 177 Ill. 386, 53 N. E. 93. Thus it would seem that the plaintiff should recover, since neither the application of the payments to prior indebtedness nor the failure on the part of the materialman to utilize possible security should discharge the surety.

TRUSTS—GIFT OF AN UNINDORSED CERTIFICATE OF STOCK—ANTECEDENT POSSESSION BY THE TRUSTEE.—The settlor bought and sold all of her securities through a friend, who kept them in her safe deposit box. The stock was registered in the settlor's name and the dividends paid directly to her. A year before her death they went together to the vault and the settlor told her friend that at her death the stock was to be distributed among certain beneficiaries. The latter consented to supervise the distribution on condition that a third party make the actual delivery to the beneficiaries. Thereafter none of the stock was sold and the settlor never exercised control over it. She made no will. The trustee was ready to carry out the trust, but the agent refused to deliver the stock and notified the public administrator that it was intestate property. The beneficiaries brought this action to establish the trust, joining as defendants the trustee, the agent, and the public administrator. *Held*, that the stock was to be held in trust to be distributed to the beneficiaries subject to the decedent's life interest in the dividends. Jenks, P. J., and Putnam, J., *dissenting*. *Orton v. Tannenbaum* (1920) 194 App. Div. 214, 185 N. Y. Supp. 681.

The instant case follows the modern tendency in applying a similar rule to gifts of non-negotiable choses in action and to gifts of chattels. The early English cases, by refusing to recognize that any interest in stock could pass by delivery without indorsement and transfer on the books, created the anomalous situation of the donee's being in possession and unable to benefit by it and the donor's having the legal title without being able to recover possession. *Rummens v. Hare* (1876) L. R. 1 Exch. Div. 169. The prevailing American doctrine is to the effect that, although a transfer on the books is required to vest the legal title, a valid gift *inter vivos* is created by the mere delivery of an unindorsed certificate of stock. *Herbert v. Simson* (1915) 220 Mass. 480, 108 N. E. 65; see (1918) 27 YALE LAW JOURNAL, 956. This applies whether the gift is absolute or in trust. *Talbot v. Talbot* (1911) 32 R. I. 72, 78 Atl. 535. Conceding that a valid gift in trust may be created by delivery, was there a delivery in the instant case? It would seem logical and desirable to follow again the chattel analogy and hold that antecedent possession by the donee, coupled with words indicating a present intention to make a gift in trust, is sufficient. *Stoneham v. Stoneham* [1919] 1 Ch. 149; *Porter v. Gardner* (1891) 60 Hun, 571, 15 N. Y. Supp. 398;

see NOTES (1920) 20 COL. L. REV. 196; Chaplin, *Express Trusts* (1897) sec. 83. The court here found as a fact that the settlor intended to create a trust *in praesenti*. The implied reservation of a life interest in the dividends was held not to affect the validity of this trust. To the same effect, see *Larimer v. Beardsley* (1906) 130 Iowa, 706, 107 N. W. 935. The result reached in the instant case appears to be most desirable in that it tends to break down the rigid rule distinguishing negotiable choses in action from other kinds of personal property.

WILLS—WHEN AFTER-ACQUIRED REAL ESTATE PASSES.—The will of the testatrix contained the following devise: "I give, devise and bequeath to my husband . . . all of my personalty and real estate, as follows, to wit:" followed by a specific description of the land devised. After the execution of this will the testatrix acquired more real estate. *Held*, that such after-acquired realty passed under the will. McCulloch, C. J., *dissenting*. *Brock v. Turner* (1921, Ark.) 227 S. W. 597.

It was well settled at common law and under the early English and American statutes, that, since a testamentary devise was in the nature of a conveyance, one could not devise realty which he did not own at the time his will was executed, though he expressly so provided. *Bunter v. Coke* (1707, K. B.) 1 Salk. 237; *Brewster v. McCall* (1842) 15 Conn. 274. But, under statutes now obtaining in most of the American states, after-acquired realty will pass under a general devise of realty if such is shown to have been the intention of the testator. These statutes are not uniform, however. The statutes of many states would seem to require that such intention clearly appear upon the face of the will. *Wright v. Masters* (1909) 81 Oh. St. 304, 90 N. E. 797; *In re Pierce* (1898) 20 R. I. 380, 39 Atl. 430. But it need not be declared in express words. *Winchester v. Foster* (1849, Mass.) 3 Cush. 366; *Woman's Miss. Soc. v. Mead* (1890) 131 Ill. 338, 23 N. E. 603. Construing such statutes as putting realty and personalty on the same footing regarding testamentary disposition, some states hold that a general devise under such statutes passes after-acquired realty. *Briggs v. Briggs* (1886) 69 Iowa, 617, 29 N. W. 632; *Welborn v. Townsend* (1889) 31 S. C. 408, 10 S. E. 96. The statutes of a majority of the states provide that a general devise is presumed to pass after-acquired real estate unless a contrary intention manifestly appears. *Redwood v. Howison* (1917) 129 Md. 577, 99 Atl. 863; *Williams v. Brice* (1902) 201 Pa. 595, 51 Atl. 376. Under such statutes the word "now" in a devise is said, generally, not to be one of limitation, but is read as of the time of death. *Hodgkins v. Hodgkins* (1908) 123 App. Div. 110, 108 N. Y. Supp. 173; *Sussex Trust v. Polite* (1919, Del.) 106 Atl. 54. The statutes of a few other states, like that of Arkansas involved in the principal case, merely give to one the power of making a devise of all of his real and personal property, without specifically referring to his intention as to after-acquired realty. Under these statutes, a general devise has been held to pass after-acquired real estate if the intention is sufficiently made out. *Mueller v. Buenger* (1904) 184 Mo. 458, 83 S. W. 458. But the presumption in favor of a general devise in the above instances is said not to arise when the testator expressly, or by clear implication, refers to the state of things existing at the time of making the will. *Wright v. Masters, supra; Hines v. Mercer* (1899) 125 N. C. 71, 34 S. E. 106. The decision in the principal case appears to rest upon an earlier decision, in which the common-law rule was expressly repudiated and it was held that a general devise passed all the real estate possessed by the testator at the time of his death. *Patty v. Goolsby* (1888) 51 Ark. 61, 9 S. W. 846. The application of that rule to the principal case seems to be difficult, however. A devise so specifically qualified as in the will here involved can scarcely be said to be general.